

EPA

**Guidance for Utilization
of Small, Minority and
Women's Business
Enterprises in
Procurement
Under Assistance
Agreements - 6010**

1997 Edition

**EPA GUIDANCE FOR UTILIZATION OF SMALL, MINORITY AND WOMEN'S BUSINESS
ENTERPRISES IN PROCUREMENT UNDER ASSISTANCE AGREEMENTS**

THE OFFICE OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION

**OFFICE OF THE ADMINISTRATOR
WASHINGTON, D.C. 20460**

United States

Environmental Protection

Agency

Office of Small

and Disadvantaged

Business Utilization

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EPA

GUIDANCE FOR UTILIZATION OF SMALL,

MINORITY AND WOMEN'S BUSINESS

ENTERPRISES IN PROCUREMENT UNDER

ASSISTANCE AGREEMENTS

**EPA GUIDANCE FOR UTILIZATION OF S/M/WBE IN PROCUREMENT
UNDER ASSISTANCE AGREEMENTS**

NOTICE

This Guidance was prepared by the United States Environmental Protection Agency for use by EPA personnel, State and local government officials, Tribal governments and business persons interested in participating in EPA financial assistance programs. The purpose of the Guidance is to provide information regarding the utilization of small, minority and women-owned business entities in procurements under EPA's financial assistance programs.

In the event there are any conflicts between this Guidance and EPA regulations, the regulations will govern.

**PREPARED BY: Office of Small and Disadvantaged
Business Utilization (1230C)
Office of the Administrator
U.S. Environmental Protection Agency
Washington, D.C. 20460**

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* Attachment 3 available upon request from OSD BU.

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GENERAL INFORMATION

CHAPTER 1

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CHAPTER 1

GENERAL INFORMATION

1. General.

The Office of Small and Disadvantaged Business Utilization (OSDBU) is responsible for establishing policy and providing procedural guidance for the utilization of small, minority, women-owned businesses and small businesses in rural areas under the Agency's financial assistance programs. Some of this guidance, however, applies only to minority and women-owned businesses. An example is the reporting requirement wherein minority and women's business utilization are reportable items and small business utilization is not. This is because no Federal statute or Executive Order has been established for the gathering of data for small business, whereas Executive Orders and Federal statutes for minority and women's business require the compilation and reporting of data relative to these business entities.

This Guidance does not constitute a regulation but rather guides and assists individuals in their efforts to understand and implement the EPA policies published in 40 CFR Parts 30, 31, and 35 and to ensure consistency with the Supreme Court's decision in Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995).

2. Policy.

It is EPA policy that recipients of EPA financial assistance through grants, cooperative agreements and loans award a fair share of contracts/procurements to small, minority and women's businesses. Since each is a separate entity, the objective is to assure that each of these three business entities is given the opportunity to participate in contract/procurement awards under EPA financial assistance agreements. This policy applies to all contracts/procurements for supplies, construction, equipment and services under any EPA grant or cooperative agreement. It also applies to any Interagency Agreement where supplies, construction, equipment and services are being contracted out.

As used in this Guidance, recipients of EPA financial assistance include subrecipients. In the case of minority business enterprises, it should be noted that various EPA statutes reference different groups. For ease of reading, the term "minority business" or "minority business enterprise (MBE)" is used throughout to encompass these groups. For further details, see Chapter 3, Definitions.

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3. Background.

In 1978, the Environmental Protection Agency issued its MBE policy statement setting forth goals for minority business utilization in the Wastewater Treatment Construction Grants Program. This policy was established as a result of the President's National Urban Policy Statement of March 27, 1978. The policy required Regional offices to establish goals to achieve a fair share of procurement dollars for minority businesses.

A policy directive was also instituted for women's business enterprises (WBE) and set a national goal of two (2%) percent for women's business utilization in EPA's construction grants program. This policy directive is no longer in effect due to the promulgation of 40 CFR Part 33, which, subsequent to its issuance was deleted. However, EPA does include women's business enterprise in the "fair share" considerations. Women-owned businesses are specifically covered in P.L. 101-507 and P.L. 102-389 (the Agency's 8% goals) and P.L. 101-549 (the Agency's 10% goal for research relating to the requirements of the Clean Air Act Amendments of 1990).

On December 17, 1982, the President issued a statement regarding his commitment to the goal of greater opportunity for economic progress and independence for all Americans. At that time the President announced the Administration's program to promote an economic environment in which minority entrepreneurs could achieve better lives for themselves and as a result contribute to a stronger economic base for the country. This program is based on the following principles:

1. A healthy, growing economy is fundamental to creating the opportunity for the formation and growth of minority-owned businesses.
2. Greater economic independence for minority Americans will best be achieved through increased opportunities for private employment and business ownership.
3. Creativity, private entrepreneurship, and individual initiative will ultimately determine the success or failure of individual minority businesses.
4. Expanded involvement of the private sector is crucial to minority enterprise developmental efforts.

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The President directed major federal grant-making agencies to encourage their recipients to achieve reasonable minority business participation under assistance agreements. Executive Order 12432, issued on July 14, 1983, directed the heads of departments and agencies to move forward and implement the directives.

The issuance of this Executive Order also required grant or cooperative agreement recipients who, in the past, had not been required to establish a "fair share" objective or to report on their procurement activities, to now conduct both. An example of such activity will include those recipients who heretofore came under the authority of OMB Circular A-110. These recipients (universities and colleges, non-profit organizations and hospitals) were required to negotiate a "fair share" objective and to use positive efforts to assist disadvantaged (minority and women) businesses. However, such recipients were not required to report on their activities concerning these business elements. With the passage of P.L. 101-507 and P.L. 102-389, these recipients are now required to report on an annual basis.

The implementation of P.L. 101-507 was effectuated by the Deputy Administrator's Memorandum, Subject: FY-91 Program for Utilization of Disadvantaged Business Enterprises in Procurement Under Assistance dated February 15, 1991. The 8% goaling criteria subsequently became Agency policy in FY-92 by the Deputy Administrator's Memorandum of January 15, 1992. On October 5, 1992, P.L. 102-389 was enacted. As a result, the 8% goaling criteria under P.L. 101-507 became a permanent requirement on all assistance programs funded by EPA. An announcement to this effect was made by the Director's Memorandum of December 15, 1992.

The Clean Air Act Amendments of 1990 were enacted into law (P.L. 101-549) on November 15, 1990. Title X, entitled "Disadvantaged Business Concerns" requires that, to the extent practicable, not less than ten percent of total Federal funding for any research relating to the requirement of the amendments shall be made available to disadvantaged business concerns. The implementation of P.L. 101-549 was established by the Deputy Administrator's memorandum, Subject: Title X of the Clean Air Act Amendments of 1990 for the Utilization of Disadvantaged business Enterprises in procurements under Assistance Programs, dated October 15, 1991.

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AUTHORITY

CHAPTER 2

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CHAPTER 2

AUTHORITY

EPA's authority to adopt and implement guidelines for the procurement of construction, services and supplies from small, minority and women-owned businesses stems directly from Executive Orders 11625, 12138 and 12432 and applicable Federal laws.

1. **Public Law 99-499**, the Superfund Amendments and Reauthorization Act of 1986 (SARA). Section 105(f) of the Amended Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) signed into law on October 17, 1986, requires that the availability of qualified minority contractors be considered when awarding contracts for any projects being funded by Superfund monies. Section 105(f) also requires a report on what actions were taken to encourage the utilization of minority contractors. Section 105(f) applies to minority contractors only and does not include small business enterprises or women-owned business enterprises unless such concerns are owned by minorities.

2. **Public Law 100-590**, the Small Business Administration Reauthorization and Amendment Act of 1988 (SBARAA), was enacted on November 3, 1988. It requires Federal agencies with substantial procurement or grant-making authority to establish rural area business enterprise development plans. The Administrator of the Small Business Administration has identified EPA as a Federal agency having substantial procurement and grant-making authority. EPA has established a Rural Area Business Enterprise Development (RABED) Plan covering both financial assistance and direct procurement.

3. **Public Law 101-507**, the 1991 Appropriations Act signed into law on November 5, 1990, contains the following language:

"The Administrator of the Environmental Protection Agency shall, to the fullest extent possible, ensure that at least 8 per centum of Federal funding for prime and subcontracts awarded in support of authorized programs, including grants, loans and contracts for wastewater treatment and leaking underground storage tanks grants, be made available to business concerns or other organizations owned or controlled by socially and economically disadvantaged individuals (within the meaning of Section 8(a)(5) and (6) of the Small Business Act (15 U.S.C. 637(a)(5) and (6)), including historically black colleges and universities. For purpose of this section, economically and socially disadvantaged individuals shall be deemed to include women...."

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4. **Public Law 101-549**, the Clean Air Act Amendments of 1990 (CAAA). Title X of the amended CAAA enacted into law on November 15, 1990, requires that to the extent practicable, not less than 10% of the total Federal funding for any research relating to the requirements of the amendments shall be made available to disadvantaged business concerns (minority, women-owned firms, disabled American-owned firms, Historically Black Colleges and Universities, colleges and universities having a student body in which 40% of the students are Hispanic, minority institutions and private and voluntary organizations controlled by individuals who are socially and economically disadvantaged).

5. **Public Law 102-389**, the 1993 Appropriations Act enacted on October 6, 1992, changes the language in the Administrative Provisions of P.L. 101-507 by adding the word "hereafter" to the first sentence of the provision which states, "The Administrator of the Environmental Protection Agency shall, hereafter..." The addition of the word "hereafter" makes the language permanent.

6. **Executive Order 12138** was issued on May 18, 1979. The Order directed all Federal agencies to: (1) facilitate, preserve and strengthen women's business enterprise and to ensure full participation by women in the free enterprise system; and (2) take affirmative action in support of women's business enterprise. Each department or agency empowered to, shall issue regulations requiring the recipient of such assistance to take appropriate affirmative action in support of women's business enterprise and to prohibit actions or policies which discriminate against women's business enterprise. Pursuant to Executive Order 12138, the regulations implemented by the agencies shall prescribe sanctions for noncompliance. Sanctions by EPA are set forth in 40 CFR §30.62 for assistance awards to recipients other than State and local governments. In the case of assistance awards to State and local governments they are set forth in 40 CFR §31.43.

7. **Executive Order 11625** was issued on October 13, 1971. The Order clarified the authority of the Secretary of Commerce to implement policy and to assist minority business enterprise. One of the factors was, "...to coordinate the participation of Federal departments and agencies in an increased minority enterprise effort." As a result, the Order required the Secretary of Commerce to, "...Promote the mobilization of activities and resources of State and local governments, businesses and trade associations, universities, foundations, professional organizations and volunteer groups toward the growth of minority business enterprise, and facilitate the coordination efforts of these groups with those of Federal departments and agencies."

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The Order further requires the Secretary, with the participation of other Federal departments and agencies, as appropriate, to develop comprehensive plans and specific program goals; establish regular program monitoring and reporting systems; and evaluate the impact of Federal support in achieving the objectives established by this Order.

The Order requires the head of each Federal department or agency to furnish information and reports in a manner prescribed by the Secretary of Commerce. It further stipulates that within the constraints of law and appropriations, Federal departments and agencies shall foster and promote minority business enterprise.

8. **Executive Order 12432** was issued on July 14, 1983. The Order directed all Federal agencies to: (1) develop an MBE plan on an annual basis; (2) establish MBE objectives; (3) identify methods for encouraging prime contractors and grantees to utilize MBEs; (4) build upon programs administered by the Small Business Administration and Minority Business Development Agency; (5) furnish an annual report regarding the accomplishments of their MBE programs; and (6) establish programs to deliver management and technical assistance to MBEs.

9. **40 CFR Part 30**. EPA implements its small business minority business and women-owned business programs for institutions of higher education, hospitals, and other non-profit organizations in 40 CFR Part §30.44(b).

10. **40 CFR Part 31**. EPA implements its small business, minority business and women-owned business programs for States, local governments and Indian Tribes through its "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and local Governments", 40 CFR Part 31, in 40 CFR §31.36(e) and this Guidance, which implements P.L. 101-507, P.L. 101-549 and P.L. 102-389.

11. **40 CFR Part 35, Subpart O**. The MBE/WBE requirements for recipients of Superfund Cooperative Agreements and Superfund State Contracts are contained in 40 CFR §35.6580 entitled "Contracting with Minority and Women's Business Enterprises (MBE/WBE), Small Businesses, and Labor Surplus Area Firms". If the recipient is awarded more than one cooperative agreement during the year, it may negotiate an annual fair share covering all of them for that year. It is not necessary to have a fair share objective for each cooperative agreement.

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12. **40 CFR Part 35, Subpart K.** Under the Clean Water Act State Revolving Fund Program, requirements for the participation of minority and women-owned businesses apply to assistance in an amount equaling the grant. To attain compliance with MBE/WBE requirements, the Regional Administrator or designee will negotiate an annual "fair share" objective with the State for MBE/WBE participation on these SRF-funded activities. A fair share objective should be based on the amount of the capitalization grant award or other State established goals. See 40 CFR §35.3145(d).

13. **Drinking Water State Revolving Fund Program.** Under the Drinking Water State Revolving Fund Program, requirements for the participation of minority and women-owned businesses apply to assistance in an amount equaling the grant. To attain compliance with MBE/WBE requirements, the Regional Administrator or designee will negotiate an annual "fair share" objective with the State for MBE/WBE participation on these SRF-funded activities. A fair share objective should be based on the amount of the capitalization grant award or other State established goals. See Drinking Water State Revolving Fund Program Guidelines, February 1997, EPA 816-R-97-005, which provide that MBE/WBE requirements are to be treated in the same manner as under the Clean Water State Revolving Fund Program.

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DEFINITIONS

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CHAPTER 3

DEFINITIONS

The following definitions are provided for your use when utilizing this guidance.

1. **Delegated State.** EPA's policy is to delegate management of the wastewater treatment works construction grants program to the maximum extent possible consistent with the objectives of the Clean Water Act, prudent fiscal management and EPA's overall national responsibility for the program. The policy is premised on an on-going partnership between EPA and the States that includes consultation with the States in formulation of policy and guidance by EPA. EPA expects States to undertake full delegation of all project level activities. Program delegation is accomplished through a formal delegation agreement between the Regional Administrator and the State. The delegation agreement will list the functions delegated and to be delegated with a schedule for their assumption by the State. For the purpose of this Guidance, whenever reference is made to a delegated State it will mean that the MBE/WBE functions have been delegated for wastewater treatment works construction grants and other types of assistance agreements. For purposes of this Guidance, the concept of delegated States does not apply to the Clean Water State Revolving Fund and the Drinking Water State Revolving Fund programs, since these programs were intended to be State designed and managed. Under these programs States assume the MBE/WBE functions.

2. **Fair Share or Fair Share Objective.** A fair share or a fair share objective is an amount of funds reasonably commensurate with the total project funding and the availability of qualified minority business enterprises (MBEs), and women-owned businesses (WBEs), taking into account experience on EPA-funded projects and other comparable projects in the area. Availability is a measure of the approximate representation and capacity of MBEs and WBEs in the relevant labor market and qualified to do the work in issue, adjusted, as appropriate, to reflect the estimated representation and capacity of such MBEs and WBEs that would exist in the absence of discrimination. A fair share objective does not constitute an absolute requirement, but a commitment on the part of the recipient or prime contractor to make good faith efforts as defined in Chapter 4, Section C, to use MBEs and WBEs to achieve the fair share objective. If a recipient chooses to meet EPA's fair share objectives by relying on its own local MBE and or WBE programs, it may do so. However, it should be made aware that it would have to defend a legal challenge to the merits of its program based upon such merits, independent of EPA's fair share objective.

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3. **Positive Efforts.** Positive efforts incorporates the good faith efforts discussed in Chapter 4, Section C, with one modification. Different steps, constituting the minimum race-neutral efforts required, apply to recipients that are state, local governments or tribal entities versus those that apply to educational institutions, hospitals and other non-profit institutions. The six steps with respect to educational institutions, hospitals and other non-profit institutions are to:

a. Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

b. Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

c. Consider in the contract process whether firms competing for large contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

d. Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

e. Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

f. If the prime contractor awards subcontracts, requiring the contractor to take steps in paragraphs (a) through (e) of this section.

4. **Minority Business Enterprise (MBE):**

a. For purposes of complying with P.L. 101-507 and P.L. 102-389 (the 8% goal statutes), an MBE is a business concern which is:

(1) Certified as socially and economically disadvantaged by the Small Business Administration:

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(a) **Socially disadvantaged individuals** are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

(b) **Economically disadvantaged individuals** are those socially disadvantaged individuals whose ability to compete in the free enterprise system is impaired due to diminished capital and credit opportunities, as compared to others in the same business area who are not socially disadvantaged. In determining the degree of diminished credit and capital opportunities, the Small Business Administration shall consider, but not be limited to, the assets and net worth of such socially disadvantaged individuals. In determining the economic disadvantage of an Indian tribe, the Small Business Administration shall consider, where available, information such as the following: The per capital income of members of the tribe excluding judgement awards, the percentage of local Indian population below the poverty level, and the tribe's access to capital markets. Individuals who certify that they are members of named groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian/Indian Americans), are to be considered socially and economically disadvantaged. Economically and socially disadvantaged individuals are deemed to include women.

(2) Certified as a minority business enterprise by a State or Federal agency;

(3) An independent business concern which is at least 51 percent owned and controlled by minority group member(s):

(a) A minority group member is an individual who is a citizen of the United States and is one of the following:

1 **Black American**;

2 **Hispanic American** (with origins from Puerto Rico, Mexico, Cuba, South or Central America);

3 **Native American** (American Indian, Eskimo, Aleut, native Hawaiian);

or

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4 **Asian-Pacific American** (with origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, Taiwan or the Indian subcontinent).

(b) In order to satisfy the criterion of the MBE definition in a.(3) the minority ownership's interest must be real, substantial and continuing. Such interest is characterized by:

- 1 Risk of loss/share of profit commensurate with the proportional ownership; and
- 2 Receipt of the customary incidents of ownership, such as compensation (i.e. salary and other personnel compensation).

(c) A minority owner must have and exercise control over the business decisions. Characteristics of control include, but are not limited to:

- 1 Authority to sign bids and contracts;
- 2 Decisions in price negotiations;
- 3 Incurring liabilities for the firm;
- 4 Final staffing decisions;
- 5 Policy-making; and
- 6 General company management decisions.

(d) Only those firms performing a useful business function according to custom and practice in the industry, are qualified as MBEs. Acting merely as a passive conduit of funds to some other firm where such activity is unnecessary to accomplish the project does not constitute a "useful business function according to custom and practice in the industry." The purpose of this approach is to discourage the use of MBE "fronts" and limit the creation of an artificial supplier and broker marketplace.

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(4) Historically Black Colleges and Universities (HBCUs).

b. For purposes of complying with with the 10% goal contained in P.L. 101-549 for research relating to the requirements of the Clean Air Act Amendments of 1990, an MBE is a disadvantaged business concern, i.e., a concern --

(1) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals or in the case of a publicly traded company, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

(2) the management and daily business operations of which are controlled by such individuals.

(3) A for-profit business concern is presumed to be a disadvantaged business concern if it is at least 51 percent owned by or in the case of a concern which is a publicly traded company at least 51 percent of the stock of the company is owned by, one or more individuals who are members of the following groups:

- (a) Black Americans.
- (b) Hispanic Americans.
- (c) Native Americans.
- (d) Asian Americans.
- (e) Women.
- (f) Disabled Americans.

(4) The presumption established by subparagraph (3) may be rebutted with respect to a particular business concern if it is reasonably established that the individual or individuals referred to in subparagraph (3) with respect to that business concern are not experiencing impediments to establishing or developing such concern as a result of the individual's identification as a member of a group specified in subparagraph (3).

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(5) The following institutions are presumed to be disadvantaged business concerns-

(a) Historically black colleges and universities, and colleges and universities having a student body in which 40 percent of the students are Hispanic.

(b) Minority institutions (as that term is defined by the Secretary of Education pursuant to the General Education Provision act (20 U.S.C. §1221 et seq.).

(c) Private and voluntary organizations controlled by individuals who are socially and economically disadvantaged.

(6) A joint venture may be considered to be a disadvantaged business concern under subparagraph (3), notwithstanding the size of such joint venture if -

(a) a party to the joint venture is a disadvantaged business concern; and

(b) that party owns at least 51 percent of the joint venture.

A person who is not an economically disadvantaged individual or a disadvantaged business concern, as a party to a joint venture, may not be a party to more than 2 awarded contracts in a fiscal year solely by reason of this subparagraph.

(7) Nothing in this paragraph shall prohibit any member of a racial or ethnic group that is not listed in subparagraph (3) from establishing that they have been impeded in establishing or developing a business concern as a result of racial or ethnic discrimination.

c. Pursuant to Section 105(f) of CERCLA, 42 U.S.C. §9605(f) (the Agency's Superfund Program), EPA is required to consider the availability of qualified minority firms in awarding Superfund contracts and to report annually to Congress on the participation of minority firms in Superfund contracts. The term "minority firms" is not defined in the statute. The term "Minority Business Enterprise" (MBE) is defined in the Agency's Cooperative Agreements and Superfund State Contracts for Response Actions Regulations, 40 CFR Subpart O, at 40 CFR §35.6015(26).

5. **Disabled American.** A disabled American means, with respect to an individual, a permanent or temporary physical or mental impairment that substantially limits one or more of

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the major life activities of such an individual; a record of such an impairment; or being regarded as having such an impairment.

6. **Historically Black Colleges and Universities (HBCUs)**. The HBCUs are identified by the Department of Education. See 34 CFR Part 608.

7. **Hispanic Colleges and Universities**. Those Colleges or Universities having a Student Body in which 40% of the Students are Hispanic. A Hispanic Individual is an individual whose origins are from Puerto Rico, Mexico, Cuba, Central and/or South America.

8. **Minority Institution**. A Minority Institution is an accredited college or university whose enrollment of a single minority group or a combination of minority groups exceeds fifty (50%) percent of the total enrollment. The Secretary of Education verifies this information from the data on enrollment in the Higher Education general Information Surveys furnished by the institution to the Office of Civil Rights, Department of Education.

9. **Small Business Concern (SBE)**. Any business entity, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards set forth in 13 CFR Part 121.

a. **Concern**. Any business entity located inside the United States that is organized for profit (even if it is owned by a non-profit entity), pays U.S. taxes, and/or uses American products, materials, and/or labor, etc. A "concern" may be an individual, a partnership, a corporation, a joint venture, an association, or a cooperative.

b. **Not dominant in the field of operation** means not exercising a controlling or major influence in an industry. A controlling or major influence can be derived from factors such as business volume, number of employees, financial resources, competitiveness, ownership or control of materials, processes, patent license agreements, facilities, sales territory, and nature of business activity.

c. **Affiliates**. Business concerns are affiliates of each other if, directly or indirectly:

(1) Either one controls or has the power to control the other; or

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- (2) Another concern controls or has the power to control both.

In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management and contractual relationships; provided that restraints imposed by a franchise agreement are not considered in determining whether the franchisor controls or has the power to control the franchisee, if the franchisee has the right to profit from its efforts, commensurate with ownership, and bears the risk of loss or failure. Any business entity may be an affiliate, whether or not it is organized for profit or located inside the United States.

d. **Annual Receipts.** Means the gross income (less returns and allowances, sales of fixed assets, and interaffiliate transactions) of a concern (and its domestic and foreign affiliates) from sales of products and services, interest, rents, fees, commissions, and/or from whatever other source derived for its most recently completed fiscal year (whether on a cash, accrual, completed contracts, percentage of completion, or other acceptable accounting basis). If a concern has been in business less than a year, its annual receipts for the purpose of a size standard will be based on 1 year's receipts and shall be computed by multiplying its average weekly figure by 52. If a concern has been in business less than 3 years, its average annual receipts for the purpose of a size standard based on 3 years' receipts shall be computed by determining its average weekly receipts for the period in which it has been in business, and multiplying such figure by 52. If a concern acquired an affiliate during the applicable accounting period, the affiliate's receipts for the period during which it was an affiliate must be added to the applicant's receipts. The receipts of a former affiliate are not included even if such a concern had been an affiliate during a portion of the applicable accounting period.

10. **Small Business in a Rural Area.** A small business in a rural area (SBRA) is a business entity meeting the definition of a small business, and is located and conducts its principal operations in a geographic area (county or parish) listed in the Small Business Administration's Listing of Non-Metropolitan Counties by State.

11. **Labor Surplus Area.** Means a civil jurisdiction determined by the Bureau of Labor Statistics (Department of Labor) to have an average unemployment rate of 120 percent of the national average or 10 percent or higher, except that no area will qualify if the average unemployment rate is less than 6 percent.

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12. **Labor Surplus Area Concern.** Means a concern that together with its first-tier subcontractors will perform work substantially (at least 50 percent of the costs for manufacturing production or services) in labor surplus areas.

13. **Rural Areas.** The U.S. Department of Agriculture developed in 1980, a Rural-Urban Continuum Code Classification. The classification code applies to every county in the United States. The classification developed indicates whether a non-metropolitan county is adjacent to a metropolitan county. Counties with a code of 4 through 9 are identified as non-metropolitan counties. However, EPA has elected to use only codes 6 through 9 as rural counties for purposes of identifying counties qualified as rural. The Rural-Urban Continuum Code Classification is available upon request from OSDPU.

14. **Financial Assistance.** The term financial assistance is synonymous with "grant-making" in the Federal Grant and Cooperative Act of 1977, and is meant to include any recipient of Federal support whenever the principal purpose of the relationship is the transfer of money, property, service, or anything of value to a State or Local Government, or other recipient, in order to accomplish a public purpose of support or stimulation authorized by Federal statute.

15. **Women's Business Enterprise (WBE)** is a business which is certified as such by a State or Federal agency, or which meets the following definition:

"A women's business enterprise is an independent business concern which is at least 51 percent owned by a woman or women, who also controls and operates it. Determination of whether a business is at least 51 percent owned by a woman or otherwise qualified WBE which is 51 percent owned by a married woman in a community property State will not be disqualified because her husband has a 50 percent interest in her share. Similarly, a business which is 51 percent owned by a married man or 49 percent owned by an unmarried woman will not become a qualified WBE by virtue of his wife's 50 percent interest in his share of the business."

As in the case of an MBE, only United States citizens will be deemed to be WBEs. Similar to the MBE criteria, WBE should meet the criteria cited in subparagraphs 4.a.(3)(b), c), and (d) of this Chapter.

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CHAPTER 4

FAIR SHARE

1. Fair Share Policy.

It is EPA policy that small (SBEs), minority (MBEs), women's (WBEs) and small businesses in rural areas (SBRAs) be afforded the maximum practicable opportunity to participate as contractors, subcontractors, suppliers and otherwise in EPA awarded financial assistance programs. This policy applies to all contracts, subcontracts and procurements for supplies, construction, equipment and services under EPA grants, cooperative agreements, interagency agreements, and loans. Pursuant to this policy, recipients of grants, agreements and loans, and their prime contractors, shall make good faith efforts to award a fair share of contracts, subcontracts and procurements to SBEs, MBEs, WBEs and SBRAs.

The policy also requires that fair share objectives for MBEs and WBEs be negotiated with the States and/or recipients, but does not require that fair share objectives be established for SBEs or SBRAs. Accordingly, while good faith efforts are required with respect to SBEs, MBEs, WBEs and SBRAs, the numerical fair share objectives apply only to MBEs and WBEs.

A fair share objective does not constitute a quota or an absolute requirement. A fair share objective imposes an obligation on the recipient or prime contractor to exercise good faith efforts as set forth in Section C. A recipient or prime contractor is not required to meet a fair share objective if it has made good faith efforts and has submitted documentation of such action.

Fiscal year fair share objectives are set based upon the negotiations which have taken place between the regions and either the delegated States or the recipient as the case may warrant.

The minimum national fair share objective is 8%, except for research relating to the requirements of the Clean Air Act Amendments of 1990, where the minimum national objective is 10%. Notwithstanding this national minimum, fair share objectives with each state and/or recipient are based on an assessment of the availability of qualified MBEs and WBEs in the relevant market; thus, the overall national objective may vary from the specific objectives of individual states and/or recipients. The Regional MBE/WBE Coordinator must report the

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negotiated fair share for delegated States and/or recipients and all program grants and cooperative agreements to Headquarters, Office of Small and Disadvantaged Business Utilization (OSDBU). Headquarters, OSDBU will use these objectives to assist in the establishment of the national objective. The national objective is for EPA purposes only and is not imposed on individual states and/or recipients or projects.

Fair share applies to EPA programs as follows:

a. **Wastewater Treatment Construction Grants Program.** The Regional Administrator or designee will negotiate an overall fair share with delegated States, (i.e., States delegated by EPA with MBE/WBE responsibilities).

(1) **Delegated States.** A state's fair share should be based upon the State project priority list, cumulative grant awards and/or projected awards for the current fiscal year, or other State or recipient established goals or standards. For programs that have state-wide application a delegated state may apply a fair share objective on a State-wide basis. A delegated state is not required to include the fair share objectives in every project award. A delegated state may allocate the fair share objectives to particular projects in its discretion to reflect any variances in MBE or WBE availability within the state. The absence of a fair share objective on a particular grant does not relieve the recipient and their prime contractors from compliance with 40 CFR § 31.36(e). Recipients other than a State or local government and their prime contractors must comply with 40 CFR §30.44(b).

(2) **Non-Delegated States.** For Wastewater Treatment Construction Grants which are awarded in States not having been delegated the procurement activity, a fair share negotiation shall take place between the Regional Administrator or his/her designee and each recipient.

(3) **Non-Title II Grants.** For non-Title II wastewater treatment construction grants, a fair share negotiation shall take place between the Regional Administrator or his/her designee and each recipient.

b. **Superfund Program.** The fair share objective on Superfund projects operates in much the same way as it does on other forms of financial assistance. However, the recipient must either agree to a specific dollar amount as a fair share objective and incorporate that amount into the cooperative agreement or must negotiate a fair share objective with EPA prior to procurement of supplies or services. If a cooperative agreement is awarded to a recipient

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with whom a fair share objective has not been negotiated, the recipient must not award any contracts until the recipient has negotiated a fair share objective with EPA. If multiple cooperative agreements are awarded to the same recipient during the year, a fair share objective can be negotiated annually for all agreements rather than individually on each cooperative agreement for that year. See 40 CFR § 35.6580.

c. **Clean Water State Revolving Fund (SRF) Program.** The Regional Administrator or his designee will negotiate an overall fair share objective with States receiving capitalization grants. Negotiations should be based upon the capitalization grant awards for the current fiscal year or other State established goals or standards. A fair share objective will be established for each capitalization grant awarded. The fair share objective will be based on the amount of Federal capitalization grants awarded or other State established goals; not on State contributions or leveraged funds deposited into the SRF. The State may accomplish its fair share objective by requiring certain SRF projects to undertake the good faith efforts. These projects are those identified by the State and which equal the amount of the capitalization grant. The State has flexibility and responsibility in establishing fair share objectives for State contributions, including leveraged funds.

Notwithstanding the "sunsetting" of October 1, 1995 of the equivalency requirement of CWA § 602(b)(6), the fair share objective continues to apply to SRF projects which equal the amount of the capitalization grant, as a result of the enactment of Pub. L. No. 102-389.

d. **Drinking Water State Revolving Fund (SRF) Program.** The Regional Administrator or his designee will negotiate an overall fair share objective with States receiving capitalization grants. Negotiations should be based upon the capitalization grant awards for the current fiscal year or other State established goals or standards. A fair share objective will be established for each capitalization grant awarded. The fair share objective will be based on the amount of Federal capitalization grants awarded or other State established goals; not on State contributions or leveraged funds deposited into the SRF. The State may accomplish its fair share objective by requiring certain SRF projects to undertake the good faith efforts. These projects are those identified by the State and which equal the amount of the capitalization grant. The State has flexibility and responsibility in establishing fair share objectives for State contributions, including leveraged funds.

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2. Developing Fair Share Objectives.

Fair share objectives are to be established each fiscal year by the Headquarters and Regional offices and submitted to the Office of Small and Disadvantaged Business Utilization no later than October 15 of the current fiscal year. To accomplish this, consideration must be given to each program activity which issues financial assistance through grants or cooperative agreements. Procurements under these assistance agreements are subject to a current fiscal year fair share objective. If a recipient chooses to meet EPA's fair share objective by relying on its own local MBE, WBE or SBRA program(s), it may do so. However, it should be made aware that it would have to defend a legal challenge to the merits of its program based upon such merits, independent of EPA's fair share objectives.

a. **Base for Negotiation Purposes.** In developing a base for negotiation purposes, it should be remembered that only the dollars associated with contract/procurement activity should be considered. For example, if the Federal share is 50 percent, but the total procurement activity is only 10 percent of the combined Federal and State and/or local funds, then the fair proportionate share should be derived from the 10 percent level. A consolidation of all grants and cooperative agreements awarded during the given fiscal year should establish a percentage objective for both MBE and WBE participation.

b. **EPA Approval of Recipient Fair Share Objectives.** The EPA does not prescribe a specific method by which the state and/or recipient must calculate MBE and WBE availability and the fair share objectives. States and/or recipients must submit documentation to reflect the data considered and the methods used to calculate the fair share objectives prior to EPA approval. No specific format for this submission is imposed; however, a state and/or recipient should provide sufficient data in order that EPA may understand the basis for the state and/or recipient's findings and proposed objectives. The EPA will review documentation submitted by the state and/or recipient to ensure that the method used to determine the proposed fair share is reasonable. States and/or recipients shall comply with requests from EPA for additional data regarding the method by which they calculated the fair share objectives.

c. **Regional Fair Share Objective.** A consolidation of all dollar amounts subsequently negotiated or goals accepted with each State and local recipient within the respective Region will be calculated against the total to establish the percentage for the Region's fair share.

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d. **Reporting of Fair Share Objectives.** The following information must be submitted with the Region's fair share objective to OSDBU/HQ. This information is required for the establishment of the Minority Business Development Plan for the agency on a fiscal year period.

(1) Total amount of funds in the Region's grants and cooperative agreement it plans to award during the current fiscal year;

(2) Total amount of procurement funds from the Region's grants and cooperative agreements which should result in contracts/procurements during the current fiscal year. It should be noted that funds to be expended in the form of contracts/procurements are not limited to only those grants and cooperative agreements awarded during the current fiscal year, but could include any previous grants or cooperative agreement which had not resulted in contracts/procurements issued during the previous year(s);

(3) Total "Fair Share" objective for contemplated awards to minority business enterprises (MBEs) during the current fiscal year in which the projection is being made. This amount is to be expressed in dollar figures and also cited as a percentage of b. above;

(4) Total "Fair Share" objective for contemplated awards to women-owned businesses (WBEs) during the current fiscal year in which the projection is being made. This amount is to be expressed in dollar figures and also cited as a percentage of b. above;

(5) Total amount of awards to be made to minority Institutions of Higher Education, Hospitals or other Non-Profit Organizations, if any; such operations may include the National Urban League, NAACP and the Historical Black Colleges and Universities, Hispanic Association of Colleges and Universities (HACUs) and other minority organizations.

(6) Total amount of R&D grants or cooperative agreements to be awarded during the current fiscal year; and

(7) Total amount of grants or cooperative agreements from subparagraph (6) above which may be contemplated for award to a minority concern, minority institution of higher education or a minority individual.

The above information must be submitted to OSDBU/HQ by not later than the 15th of October for each fiscal year.

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3. Good Faith Efforts.

Good faith efforts by a recipient or prime contractor mean efforts to attract and utilize SBEs, MBEs, WBEs and SBRAs primarily through outreach, recruitment and race/gender neutral activities; at a minimum, fulfillment of the six affirmative steps set forth below. EPA's experience is that recipients and prime contractors have been and should be able to meet fair share objectives through effective race/gender neutral outreach and recruitment of MBEs, and

EPA's primary emphasis will continue to be for recipients and prime contractors to expand MBE/WBE participation primarily through race/gender neutral methods. When MBE/WBE utilization falls significantly below the fair share objectives, despite the use of aggressive race/gender neutral efforts, however, EPA may evaluate, in certain circumstances, whether the recipient and/or prime contractor considered or used reasonable race/gender conscious efforts to meet the objectives.

a. **Outreach, Recruitment and Race/Gender Neutral Activities.** A recipient and prime contractor must engage in outreach, recruitment, or other race/gender neutral activities as part of their good faith efforts to achieve the fair share objective. A recipient or prime contractor may select various outreach, recruitment or other race/gender neutral activities for a particular contract but, at a minimum, a recipient or prime contractor must take six steps. The six steps differ depending on whether the recipient is a state, local government or Indian tribe, or an educational institution, hospital, or other non-profit institution. The six steps for an educational institution, hospital or other non-profit institution are set forth in Chapter 3. If the recipient is a state or local government or Indian tribe, the six affirmative steps are to:

- (1) Include qualified SBEs, MBEs, and WBEs on solicitation lists;
- (2) Assure that SBEs, MBEs, and WBEs are solicited whenever they are potential sources;
- (3) Divide total requirements, when economically feasible, into small tasks or quantities to permit maximum participation of SBEs, MBEs, and WBEs;
- (4) Establish delivery schedules, where the requirements of the work permit, which will encourage participation by SBEs, MBEs, and WBEs;

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(5) Use the services and assistance of the Small Business Administration and the Minority Business Development Agency, U.S. Department of Commerce, as appropriate; and

(6) If the prime contractor awards contracts/procurements, require the contractor to take the affirmative steps in paragraphs a.(1) through a.(5), of this section.

b. **Encouragement of Participation and Utilization of all MBEs and WBEs.** EPA's fair share policy encourages the participation and utilization of all MBEs and WBEs, including new and emerging MBEs and WBEs. Even though a prime contractor awards a subcontract to an MBE or WBE, the prime contractor is still required to comply with the good faith efforts, including the six affirmative steps.

c. **MBE or WBE Prime Contractor.** If an MBE or WBE prime contractor awards any subcontracts or procurements, such prime also must engage in the good faith efforts to achieve the fair share objectives.

d. **Race/Gender Conscious Efforts.** To the extent race and/or gender neutral efforts described in Section 3.a. prove to be inadequate to achieve a fair share objective for MBEs and WBEs, a recipient or prime contractor is authorized to take reasonable race and/or gender conscious action to the extent necessary to more closely achieve the fair share objective. Any use of race and/or gender conscious efforts must not result in the selection of an unqualified MBE or WBE.

e. **Recordkeeping Requirements.** Recipients must retain all records documenting their and their prime contractor(s)' good faith efforts. In addition, recipients must submit EPA Form 5700-52A, "MBE/WBE Utilization Under Federal Grants, Cooperative Agreements, and Interagency Agency Agreements," to the EPA award official beginning with the Federal fiscal year quarter the recipient receives the award and continuing until the project is completed. These reports must be submitted to the award official within 30 days of the end of the Federal fiscal quarter (January 30, April 30, July 30 and October 30). EPA Form 5700-52A sets forth MBE and WBE utilization during the prior contract/procurement award phases of the grant or cooperative agreement.

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f. **Guidance for Outreach, Recruitment and Race/Gender Neutral Activities.** EPA offers the following examples of activities to assist recipients and prime contractors in carrying out the outreach, recruitment and race/gender neutral activities. EPA or delegated States should encourage recipients to adopt these examples and use them to evaluate recipients and prime contractors' compliance with the good faith efforts.

(1) Include qualified SBEs, MBEs, and WBEs on solicitation lists.

(a) Maintain and update a listing of qualified SBEs, MBEs, WBEs and SBRAAs that can be solicited for supplies, construction and/or services.

(b) Provide listings to all interested parties who requested copies of the bidding or proposing documents.

(c) Contact appropriate sources within your geographic area and State to identify qualified MBEs and WBEs for placement on your minority and women's business listings.

(d) Utilize other MBE/WBE listings such as those of the State's Minority Business Office, the Small Business Administration, Minority Business Development Agency, U.S. Environmental Protection Agency, Office of Small and Disadvantaged Business Utilization (OSDBU), and the Department of Transportation.

(e) Have the State environmental agency personnel review this solicitation list.

(2) Assure that SBEs, MBEs, and WBEs are solicited.

(a) Conduct meetings, conferences, and follow-ups with SBEs, MBEs, WBEs and SBRAAs, small, minority and/or women's business associations, minority media, etc., to inform these groups of opportunities to provide supplies, services, and construction.

(b) MBE utilization is facilitated if the recipient or prime contractor advertise through the minority media. Such advertisements may include, but are not limited to, contracting and subcontracting opportunities, hiring and employment, or any other matter related to the project.

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(c) Conduct pre-bid, pre-solicitation, and post-award conferences to ensure that consultants, suppliers, and builders solicit SBEs, MBEs, WBEs and SBRAAs.

(d) Provide bidders and offerors with listings of qualified SBEs, MBEs, WBEs, and SBRAAs and establish that a fair share of contracts/procurements should be awarded to these groups.

(e) Advertise in general circulation, trade publications, State agency publications of identified source, minority or women's business focused media, etc., concerning contracting opportunities on your projects. Maintain a list of minority or women's business-focused publications that may be utilized to solicit MBEs or WBEs.

(f) Provide interested SBEs, MBEs, WBEs or SBRAAs with adequate information about plans, specifications, timing and other requirements of the proposed projects.

(g) Provide SBE, SBRA, MBE or WBE trade organizations with succinct summaries of solicitations.

(h) Notify SBEs, MBEs, WBEs or SBRAAs of future procurement opportunities so that they may establish bidding solicitations and procurement plans.

(3) Divide total requirements when economically feasible, into small tasks or quantities to permit maximum participation of SBEs, MBEs, WBEs and SBRAAs.

(a) Perform an analysis to identify portions of work that can be divided and performed by qualified SBEs, MBEs, WBEs and SBRAAs.

(b) Scrutinize the elements of the total project to develop economically feasible units of work that are within the bonding range of SBEs, MBEs, WBEs and SBRAAs.

(c) Analyze bid packages for compliance with the good faith efforts to afford SBEs, MBES, WBEs and SBRAAs maximum participation.

(4) Establish delivery schedules, where requirements of the work permit, which will encourage participation by SBEs, MBEs, WBEs, and SBRAAs.

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(a) Consider lead times and scheduling requirements often needed by SBE, MBE, WBE or SBRA participation.

(b) Develop realistic delivery schedules which may provide for greater SBE, MBE, WBE or SBRA participation.

(5) Using the services and assistance of the Small Business Administration and the Minority Business Development Agency of the U.S. Department of Commerce, as appropriate.

(a) Use the services of outreach programs sponsored by the Minority Business Development Agency and/or the Small Business Administration to recruit bona fide firms for placement on SBEs', MBEs', WBEs' or SBRAs' bidders lists to assist these firms in the development of bid packaging.

(b) Seek out Minority Business Development Centers (MBDCs) to assist recipients and prime contractors in identifying MBEs for potential work opportunities on your projects. Use the Memorandum of Understanding (Attachment 4) between EPA and MBDA to assist in providing management and technical assistance.

4. Agreement Conditions.

All EPA grants, cooperative and assistance agreements and loans must contain a condition requiring recipients to comply with the Fair Share program. Set forth below is language that must be included in the designated circumstance:

a. If the Award Official or his designee HAS NEGOTIATED a "Fair Share" objective with the recipient, use the following model condition:

The recipient must ensure to the fullest extent possible that at least (insert the negotiated fair share percentages) of Federal funds for prime contracts or subcontracts for supplies, construction, equipment or services are made available to organizations owned or controlled by socially and economically disadvantaged individuals, women and historically black colleges and universities (fair share objective).

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The recipient agrees to include in its bid documents fair share objectives of _____ (insert the negotiated fair share percentage) and require all of its prime contractors to include in their bid documents for subcontracts the (insert the negotiated fair share percentage) fair share percentages.

To evaluate compliance with the Fair Share policy, the recipient also agrees to comply with 40 CFR §§ 30.44(b), 31.36(e), 35.3145(d) or 35.6580, as appropriate.

The State and/or recipient agrees to submit an EPA Form 5700-52A, "MBE/WBE Utilization Under Federal Grants, Cooperative Agreements, and Interagency Agency Agreements," to the EPA award official beginning with the Federal fiscal year quarter the recipient receives the award and continuing until the project is completed. These reports must be submitted to the award official within 30 days of the end of the Federal fiscal quarter (January 30, April 30, July 30 and October 30).

b. If the Award Official or his designee HAS NOT NEGOTIATED a "Fair Share" with the recipient, use the following model condition:

The recipient agrees to negotiate a "Fair Share" percentage with EPA before the recipient begins the process to award any contracts under this agreement.

The recipient must ensure to the fullest extent possible that at least the negotiated fair share percentages of Federal funds for prime contracts or subcontracts for supplies, construction, equipment or services are made available to organizations owned or controlled by socially and economically disadvantaged individuals, women and historically black colleges and universities (fair share objective).

The recipient agrees to include in its bid documents the negotiated fair share percentages and require all of its prime contractors to include in their bid documents for subcontracts the negotiated fair share percentages.

To evaluate compliance with the Fair Share policy, the recipient also agrees to comply with 40 CFR §§ 30.44(b), 31.36(e), 35.3145(d) or 35.6580, as appropriate.

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The State and/or recipient agrees to submit an EPA Form 5700-52A, "MBE/WBE Utilization Under Federal Grants, Cooperative Agreements, and Interagency Agency Agreements," to the EPA award official beginning with the Federal fiscal year quarter the recipient receives the award and continuing until the project is completed. These reports must be submitted to the award official within 30 days of the end of the Federal fiscal quarter (January 30, April 30, July 30 and October 30).

c. If the Award Official or his designee HAS NEGOTIATED a "Fair Share" with the recipient for Clean Water or Drinking Water capitalization grants, use the following model condition:

The recipient must ensure to the fullest extent possible that at least (insert the negotiated fair share percentages) of capitalization grant funds for prime contracts or subcontracts for supplies, construction, equipment or services are made available by the State and/or SRF assistance recipient to organizations owned or controlled by socially and economically disadvantaged individuals, women and historically black colleges and universities (fair share objective).

The recipient agrees to select certain projects to achieve, to the fullest extent possible, the State's fair share objective and to require those selected project participants to comply with 40 CFR §§ 30.44(b), 31.36(e), 35.3145(d), 35.6580 or the Drinking Water State Revolving Fund Program Guidelines, as appropriate. The recipient agrees to require (and to assure that the selected assistance recipients also require) that all prime contractors included in their bid documents for subcontracts the fair share objectives of _____ (insert the negotiated fair share percentage).

The State and/or recipient agrees to submit an EPA Form 5700-52A, "MBE/WBE Utilization Under Federal Grants, Cooperative Agreements, and Interagency Agency Agreements," to the EPA award official beginning with the Federal fiscal year quarter the recipient receives the award and continuing until the project is completed. These reports must be submitted to the award official within 30 days of the end of the Federal fiscal quarter (January 30, April 30, July 30 and October 30).

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d. If the Award Official or his designee HAS NOT NEGOTIATED a "Fair Share" with the recipient for Clean Water or Drinking Water capitalization grants, use the following model condition:

The recipient agrees to negotiate a "Fair Share" percentage with EPA before the recipient begins the process to award any contracts under this agreement.

The recipient must ensure to the fullest extent possible that at least the negotiated fair share percentages of capitalization grant funds for prime contracts or subcontracts for supplies, construction, equipment or services are made available by the State and/or SRF assistance recipient to organizations owned or controlled by socially and economically disadvantaged individuals, women and historically black colleges and universities (fair share objective).

The recipient agrees to select certain projects to achieve, to the fullest extent possible, the State's fair share objective and to require those selected project participants to comply with 40 CFR §§ 30.44(b), 31.36(e), 35.3145(d), 35.6580 or the Drinking Water State Revolving Fund Program Guidelines, as appropriate. The recipient agrees to require (and to assure that the selected assistance recipients also require) that all prime contractors include in their bid documents for subcontracts the negotiated fair share percentages.

The State and/or recipient agrees to submit an EPA Form 5700-52A, "MBE/WBE Utilization Under Federal Grants, Cooperative Agreements, and Interagency Agency Agreements," to the EPA award official beginning with the Federal fiscal year quarter the recipient receives the award and continuing until the project is completed. These reports must be submitted to the award official within 30 days of the end of the Federal fiscal quarter (January 30, April 30, July 30 and October 30).

e. If the Award Official or his designee HAS NEGOTIATED a "Fair Share" objective with the recipient for any research relating to the requirements of the Clean Air Act Amendments of 1990, use the following model condition:

The recipient must ensure to the fullest extent possible that at least (insert the negotiated "fair share" percentages) of Federal funds for prime contracts or subcontracts for supplies, construction, equipment or services are made available to organizations owned or controlled by socially and economically disadvantaged individuals, women, disabled Americans,

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historically black colleges and universities, colleges and universities having a student body in which 40% or more of the students are Hispanic, minority institutions having a minority student body of 50% or more, and private and voluntary organizations controlled by individuals who are socially and economically disadvantaged. The recipient agrees to include in its bid documents (insert the negotiated fair share percentages) "fair share" objectives and require all of its prime contractors to include in their bid documents for subcontracts (insert the negotiated fair share percentages) "fair share" objectives.

To evaluate compliance with the Fair Share policy, the recipient also agrees to comply with 40 CFR §§ 30.44(b) or 31.36(e), as appropriate.

f. If the award official HAS NOT NEGOTIATED a "Fair Share" with the recipient for any research relating to the requirements of the Clean Air Act Amendments of 1990, use the following model condition:

The recipient agrees to negotiate a fair share objective with EPA before the recipient begins the process to award any contracts under this agreement". The recipient must ensure to the fullest extent possible that at least the negotiated fair share objective of Federal funds for prime contracts or subcontracts for supplies, construction, or services are made available to organizations owned or controlled by socially and economically disadvantaged individuals, women, disabled Americans, Historically Black Colleges and Universities, colleges and

Universities having a student body in which 40% or more of the students are Hispanic, minority institutions having a minority student body of 50% or more, and private and voluntary organizations controlled by individuals who are socially and economically disadvantaged. The recipient agrees to include in its bid documents the negotiated fair share percentages and require all of its prime contractors to include in their bid documents for subcontracts the negotiated fair share percentages.

To evaluate compliance with the Fair Share policy, the recipient also agrees to comply with 40 CFR §§ 30.44(b) or 31.36(e), as appropriate.

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RESPONSIBILITIES

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CHAPTER 5

RESPONSIBILITIES

1. **Headquarters, Office of Small and Disadvantaged Business Utilization, (OSDBU).** The Director, OSDBU has the principal responsibility for developing and promulgating the Agency's policies to assure reasonable participation by small, small businesses in rural areas, minority and women's businesses in performing activities under EPA financial assistance agreements. OSDBU will perform the following:

a. Prepare an annual plan in consultation with the program and the Regional Offices for submission to the Minority Business Development Agency, U.S. Department of Commerce. The plan will encompass the projections for minority and women's businesses in activities assisted by EPA grants and cooperative agreements;

b. Provide guidance and training to EPA Headquarters and Regional Staff, and to State personnel performing activities under grants, cooperative agreements and Interagency agreements;

c. Develop and provide guidelines suggesting ways and means of promoting fair share activities and provide training in their use to Agency program and Regional officials as well as State and local government officials;

d. Maintain records of MBE/WBE participation and prepare a quarterly report (MBDA Form 91) which will be a composite of all reports from the Headquarters elements as well as the Regions. The MBDA Form 91 will be prepared for the Office of Small and Disadvantaged Business Utilization Director's signature and transmitted to the Minority Business Development Agency, U.S. Department of Commerce;

e. Review Regional guidance, SBE/SBRA/MBE/WBE guidance to insure consistency with Agency policies and guidance;

f. Establish and maintain a working relationship with the Minority Business Development Agency (MBDA) and the U.S. Small Business Administration (SBA);

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2. **Award Official.** For other than grant awards to States administered by the EPA Regions, the appropriate EPA Award Official or designee is responsible for negotiating a fair share and for seeing that project officers, other staff, and recipients comply with EPA's policy of awarding a fair share of contracts/procurements to SBEs, MBEs, WBEs and SBRAs.

3. **Regional Administrators.** The Regional Administrator or his designee is responsible for ensuring the negotiation of an overall fair share objective with each delegated State receiving financial assistance from EPA and with States that receive Clean Water and Drinking Water SRF capitalization grants. For all other entities receiving financial assistance, fair share negotiations will be conducted directly with the recipients. The Regional Administrator or designee is also responsible for certifying the validity of the MBE/WBE data collected from the recipients.

4. **HQ/Regional SDBU Coordinator.** The HQ/Regional SDBU Coordinator is responsible for all functional activities relating to small, small businesses in rural areas, minority and women's business enterprises within the respective Region. In this capacity, the Regional SDBU Coordinator is responsible to the Deputy Regional Administrator or his/her designated Regional official to assure that all facets of this program are properly carried out. The SDBU Coordinator will be responsible for the following activities:

a. Implements policy for ensuring participation of small, small businesses in rural areas, minority and women's business enterprises in EPA's financial assistance programs;

b. Implements procedures for ensuring the effective execution of the Agency's regulations and policy guidance governing small, small businesses in rural areas, minority and women's business enterprises in the grants and cooperative agreements programs;

c. Provides technical oversight, guidance and assistance to Regional personnel, State and local officials, and small businesses in rural areas, minority and women's business enterprises on an as required basis;

d. Ensures that Regional personnel responsible for the awarding of grants and cooperative agreements receive adequate training and information on utilization of small, small businesses in rural areas, minority and women's business enterprises;

e. Maintains adequate records and monitors the preparation of reports concerning small, small businesses in rural areas, minority and women's business participation in the Region's grants and cooperative agreements programs;

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f. Reviews and reports accomplishments of the Region's activities with respect to minority and women's business enterprises and assure that these reviews and reports are accurate assessments of accomplishments. If shortfalls are encountered, the SDBU Coordinator is responsible for promoting actions to improve the situation for future procurements. In the case of delegated States, coordination will be made with the cognizant party in the State by the SDBU Coordinator to establish what actions can be taken to promote greater utilization of small businesses in rural areas, minority and women's businesses;

g. Establishes, maintains and disseminates information to small, small businesses in rural areas, minority and women's business entrepreneurs on opportunities available under the Agency's grants and cooperative agreements programs. Informs these business entities of sources or contacts for contract/procurement considerations;

h. Participates and cooperates with all Federal programs and other programs designed to provide financial, technical, management and other forms of technical support and assistance to small, small businesses in rural areas, minority and women's business entrepreneurs interested in opportunities which are available in the Region's grants and cooperative agreements programs;

i. Serves as the principal focal point between the Region and Headquarters, OSDBU on matters pertaining to small, small businesses in rural areas, minority and women business enterprise programs;

j. Coordinates activities, reports, reviews, etc., with other Regional personnel who have been designated as SDBU liaisons for their respective grants and/or cooperative agreements programs;

k. Serves as principal individual for the Region on matters pertaining to small, small businesses in rural areas, minority and women' business enterprises dealing with sister agencies involved in the same areas of work, i.e., Small Business Administration (SBA), Minority Business Development Agency (MBDA) or any of its funded activities, e.g., Minority Business Development Centers (MBDCs), State and local assistance grantees, etc., when such functions relate to EPA-funded programs;

l. Serves as MBE/WBE Training official when providing such to State and local offices, prime contractors or small, small businesses in rural areas, minority and women's business entrepreneurs;

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m. Maintains lists of MBEs and WBEs that have participated in EPA-funded projects and seeks out and identifies additional firms for inclusion on EPA listings, such as the Regional SBE/SBRA/MBE/WBE listings or for placement on MBDA's Profile System;

n. Works in cooperation with the MBDA, MBDCs, the Minority Business Opportunity Committees (MBOCs), the Small Business Administration (SBA) and other State or local activities involved in similar efforts;

o. Provides assistance to Headquarters, OSDDBU in the preparation of the annual work plan as required by MBDA. Reports on Regional "Fair Share" objective which is established at the beginning of each fiscal year. Develops other data as required, to meet the requirements which MBDA may request; and

p. For those States that have not been delegated MBE/WBE responsibilities, the Regional Offices are responsible for ensuring that recipients comply with 40 CFR §31.36(e). In these non-delegated States, Regional Offices will negotiate the amount of contract awards that will be made to MBEs and WBEs with each recipient prior to submitting their fair share projections to Headquarters.

5. **Delegated States of EPA Financial Assistance.** States delegated the responsibility to review recipient procurement procedures of EPA financial assistance are responsible for assuring that the fair share principle is fully implemented.

a. In order to ensure that the delegated States perform all of their SBE, MBE, WBE and SBRA responsibilities, the EPA Regional Offices should consider specifically incorporating these responsibilities into the delegation agreements.

b. Delegated States and not EPA are responsible for allocating a MBE/WBE "fair share" objective to a particular project or grant.

6. **Clean Water State Revolving Fund (SRF) Recipients.** States receiving Clean Water SRF capitalization grants are responsible for ensuring that the fair share principle is carried out.

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a. States must comply with the requirements set forth in 40 CFR §31.36(e) and §35.3145 regarding MBE/WBE participation and reporting under the SRF program.

b. To ensure to the fullest extent possible that it attains its fair share objective, States will designate and ensure that certain recipients of SRF assistance will comply with the requirements set forth in 40 CFR §35.3145(d) and (e) regarding MBE/WBE participation and reporting under the SRF program. States, and not EPA, are responsible for allocating a fair share objective to a particular recipient of SRF assistance. It is the States' responsibility to determine the extent of this fair share amount and to assign or negotiate the fair share objective with the SRF assistance recipient.

7. **Drinking Water State Revolving Fund (SRF) Recipients.** Pursuant to the Drinking Water State Revolving Fund Program Guidelines, the same requirements which apply to the Clean Water SRF program apply to States receiving Drinking Water SRF capitalization grants.

8. **Recipients of EPA Financial Assistance.** Recipients, including non-delegated States, of EPA financial assistance are responsible for assuring the "fair share" objectives are fully implemented by itself and prime contractors.

a. Recipients must comply with the small, minority and women's business enterprise-related requirements in 40 CFR §31.36(e), 40 CFR §30.44(b), 40 CFR §35.3145, and 40 CFR §35.6580, as applicable.

b. The recipient is responsible for ensuring that the prime contractor(s) awarding contracts/procurements comply with the regulations specified in a. above.

c. Recipients must encourage the solicitation of SBEs, MBEs, WBEs and SBRAAs, whenever they are potential sources. Examples of activities used by some recipients include the following:

(1) Holding pre-bid conferences, with interested SBEs, MBEs, WBEs and SBRAAs in attendance when possible, to highlight and explain the requirements of the SBE, MBE, WBE and SBRA policies and procedures to prospective bidders;

(2) Including SBE, MBE, WBE and SBRA policies and procedures and project objectives in Requests for Proposals (RFP) and Invitations for Bids (IFB);

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(3) Publishing announcements(s) of SBE, MBE, WBE and SBRA opportunities for work on EPA-funded projects;

(4) Providing prospective bidders/offerors with SBE, MBE/WBE/SBRA source lists;
and

(5) Providing liaison services between SBEs, MBEs, WBEs, SBRAAs and prospective bidders/offerors. Liaison services should not be delegated to consultants where potential or possible conflict of interest exists.

d. After bid opening or receipt of proposal(s), the recipient must evaluate bids to determine whether they are responsive to all material terms of the bid solicitation.

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CERTIFICATION OF SBE'S, MBE'S AND WBE'S

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CHAPTER 6

CERTIFICATION OF SBE'S, MBE'S AND WBE'S

1. Certification of MBE'S and WBE'S.

In order to be deemed a bona fide MBE or WBE, a firm must be:

- a. Certified by the Small Business Administration, or
- b. Certified by a State or Federal Agency, or

c. Be an independent business concern which is at least 51 percent owned and controlled by minority group member(s) for MBE(s) or women WBE(s) who are citizens of the United States. (The criteria concerning U.S. citizenship applies to all of the above).

2. **Acceptance of Certification.** EPA does not certify firms. EPA will accept as bona fide any MBE/WBE which is certified by SBA, a State or another Federal agency and will not generally require such MBEs/WBEs to submit answers to lengthy questionnaires or provide detailed corporate information. However, where EPA has reasonable cause to believe that a firm doing business is not a legitimate SBE, MBE, WBE or SBRA, EPA may require that firm to submit appropriate data to prove ownership and control. (See Paragraph 4).

3. **State, Local and Recipient Certification Processes.** Recipients may decide to develop a certification form for bidders or offerors, including first tier subcontractors and suppliers who submit bids and offers to the recipients and/or prime contractors, stating whether or not the bidder or offeror is a small, minority or women's business. If this certification is required to be submitted prior to award of contracts/procurements, it may help ensure that only bona fide minority and women's businesses are making bids/offers. By certifying, a bidder or offeror is stating that it is (or is not) a bona fide small, minority, or women's business, and a false certification carries with it the penalties for making a false statement as prescribed in State laws and 18 U.S.C. Section 1001.

4. **EPA's Reason to Question Certification.** In the event EPA has reason to question the certification of an MBE or WBE, EPA may request additional information including, but not limited to:

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- a. The certificate described above; and
 - b. Specific information concerning the firm, including:
 - (1) Name, address and telephone number;
 - (2) Type of business entity (e.g., partnership, corporation, sole proprietor);
 - (3) Date firm was established;
 - (4) Names and addresses of legal owners including the race, gender, percentage of ownership, percentage of control and the date each owner became an owner in the firm;
 - (5) Financial, banking and credit information;
 - (6) Whether the firm has ever been denied certification as an MBE/WBE by SBA, a State or Federal agency, and if so when and by whom; and
 - (7) Other information demonstrating ownership and control.
5. **Challenging the Status of an MBE/WBE.** A protest by a firm challenging another firm's status as an SBE/MBE/WBE will not be entertained under EPA's bid protest procedures. In the event that a firm has misrepresented its status as an MBE/WBE, the matter may, at the option of EPA, be investigated by the Office of Inspector General and, where appropriate, turned over to the Department of Justice for criminal and/or civil prosecution.

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REPORTING REQUIREMENTS

CHAPTER 7

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CHAPTER 7

REPORTING REQUIREMENTS

1. **Reporting Requirements.**

**EPA DOES NOT HAVE A THRESHOLD FOR SIZE OF PROCUREMENT UNDER
ASSISTANCE OR FOR THE SIZE OF THE PROCUREMENT ACTION IN ORDER FOR
REPORTING REQUIREMENTS TO APPLY.**

The effectiveness of the fair share policy is measured through quarterly reports. These reports measure progress in achieving MBE/WBE fair share objectives established under P.L. 101-507 and P.L. 102-389. In addition, E.O. 12432 requires each Federal agency to submit quarterly and annual reports indicating the level of financial assistance provided and the amounts of such funds which were subsequently awarded to minority business enterprises.

a. **EPA Form 5700-52A, "MBE/WBE Utilization Under Federal Grants, Cooperative
Agreements and Interagency Agreements".**

(1) The recipient must submit a properly executed EPA Form 5700-52A to the delegated State or the Award official in every Federal fiscal quarter or year. Reports will continue until project completion. Unless otherwise noted in this Guidance, recipients will follow the instructions on EPA Form 5700-52A.

(2) **EPA requires that the total contract/procurement dollars awarded to all firms be reported for each quarter or year. This means not planned dollars, but actual dollars awarded. The MBE and WBE dollars and percentages are to be calculated on this actual quarterly or yearly total contract/procurement award amount to all firms.**

(3) Applicants for a Step 2+3 construction grant must submit a completed EPA Form 5700-52A indicating the level of MBE/WBE participation during the planning phase of the project. The form must be submitted before the applicant begins building the project. (See 40 CFR §35.2104(a)(4) of the Wastewater Treatment Construction Grants regulation).

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(4) Applicants for a Step 3 construction grant which includes an allowance for planning and/or design must include with their application a completed EPA Form 5700-52A indicating the level of MBE/WBE participation during the planning and design phases of the project.

b. **EPA Form 6005-2, U.S. Environmental Protection Agency, Office of Small and Disadvantaged Business Utilization, Minority and Women's Business Consolidated Report.**

(1) The SDBU Coordinators designated by the Regional Administrators in the various Regional offices will collect, collate and monitor the EPA Form 5700-52A reports submitted by the recipients. After compiling and consolidating the data on an EPA Form 6005-2, (See Attachment 2), the Regional SDBU Coordinator designees will submit the EPA Form 6005-2 to the Headquarters OSDBU Office. Headquarters and Cincinnati Office designees will also forward the report to OSDBU. In both cases the **"FORM 6005-2 MUST BE RECEIVED BY OSDBU HEADQUARTERS NOT LATER THAN FEBRUARY 15, MAY 15, AUGUST 15, AND NOVEMBER 15. NO EXTENSIONS WILL BE AUTHORIZED BY OSDBU"**.

The Regional reporting process is being automated and should be fully implemented by Fiscal Year 1998 in all Regions.

(2) The following information will be used in preparing the EPA Form 6005-2 for submission to Headquarters, OSDBU:

(a) **Late Data.** Data received after report submission (late data received) can be entered on succeeding reports, except for the 4th quarter. You **cannot**, however, change the dollar figures or percentages covered in your previously reported quarter. The late data, as well as the new quarterly data, is to be included in your new or succeeding quarterly report. Any late data received after the 4th quarter report has been submitted **cannot** be submitted on a revised report. The data would have to be reported in the 1st quarter of the new reporting period.

(b) **Percentages.** Percentages should be rounded off to the nearest single decimal place (tenth). Example: 6.51% = 6.5%.

(c) **Dollars.** Dollars should be shown fully. Round cents to the nearest dollar. Example: \$10,120,821.25 = \$10,120,821 or \$42,176.62 = \$42,177.

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(d) **Total Contract/Procurement Dollars.** Total contract/procurement dollars of **all** the Agency's financial assistance programs being counted, e.g., Wastewater Treatment Program, Superfund, SRF, etc. (This is not the total amount of the grants or cooperative agreements, it is only the contract/procurement dollar portion). **USE EXACT DOLLARS, DO NOT USE ESTIMATES.**

(e) **Negative Reports.** If the recipient submits negative reports, i.e., no contract/procurement dollars awarded in a particular program, the EPA Form 6005-2 will state the reason for such on the respective program line. Such as, no report received or "force accounts", etc.

(f) **Regional Fair Share.** In the first set of sections on the EPA Form 6005-2, under the printed entry which states "Regional Fair Share", the Region must indicate the annual fair share in both percentages and dollar amounts for MBEs and WBEs. Example: MBE = 10% - \$73,458.0. This signifies that the negotiated MBE fair share is \$7,345.80 (rounded to \$7,346.0), which would be equal to 10 percent of the total contract/procurement dollars available for procurement.

2. Reporting on Continuing Environmental Programs.

Continuing Environmental Program Grants involve financial assistance to States, tribal or local recipients for Continuing Environment programs. Examples of these grants include those specified in 40 CFR Part 35, Subpart A, as well as performance partnership grants. These programs do not include the Wastewater Treatment Construction Program, the Superfund Program, the Clean Water and Drinking Water State Revolving Fund (SRF) Programs, the Asbestos (ASHAA) Program, or the Leaking Underground Storage Tank (LUST) Program. Reports for continuing environmental programs will be required to be submitted on all programs on an annual basis.

3. Reporting on Indian Tribes/Nations and Trust Territories.

a. Assistance awards to Indian Tribes/Nations and Trust Territories are to be reported by the Regional offices as follows:

- (1) Identify by name.

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- (2) Location, including State.
- (3) Total dollar amount of award.
- (4) Date of award.
- (5) Program, e.g., SRF, Superfund, etc.

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REPORTING REQUIREMENTS

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CHAPTER 8

COUNTING MBE/WBE PARTICIPATION

1. **Calculating MBE/WBE Participation.** For purposes of reporting, the following is the approach EPA will use in calculating MBE/WBE participation.

a. Credit for MBE/WBE participation under these policies shall be granted for MBEs/WBEs performing a useful business function according to custom and practice in the industry. No credit will accrue for an MBE/WBE acting merely as a passive conduit of funds to some other, non-minority firm.

However, an MBE or WBE may further subcontract a portion of the work to SBEs provided that such further subcontracting is in accordance with this Guidance and that the majority of work is being performed by the MBE or WBE having the contract. MBE/WBE participation will not be counted when the MBE or WBE subcontracts back to the prime contractor.

b. Objectives for MBE/WBE participation shall be calculated as a percentage of total eligible contract/procurement costs.

c. Credit for MBE/WBE project-related work that is not eligible for EPA assistance may be included in the calculation of MBE/WBE participation.

d. Joint ventures shall be credited towards the recipient's percentage of MBE/WBE participation by crediting the MBE/WBE portion of the dollar amount of the joint venture. Where the MBE's/WBE's risk of loss, control or management responsibilities are not commensurate with the share of profit, the Regional Administrator or designee may direct an adjustment in the percentage of participation. In the case of a joint venture, which includes an MBE/WBE, credit will be calculated proportionately towards their respective objective.

e. Supplier is defined as follows: A supplier is a business which acts as a distributor of materials or equipment, and which provides a commercially useful function when such activity is traditional in the industry manufacturing the material or equipment supplied. Suppliers will receive 25% credit for providing supplies and receive 100% for manufacturing or fabrication of supply items. Haulers will receive 100% credit if they provide the material that is hauled. Commercially useful function will normally include:

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(1) Providing technical assistance to the purchaser prior to the purchase, during installation and after the supplies or equipment are placed in service;

(2) Manufacturing or being first tier below manufacturer of the supplies or equipment supplied;

(3) Providing functions other than just accepting and referring request for supplies or equipment to another party for direct shipment to a contractor.

2. **MBE/WBE as a prime contractor.** How is MBE/WBE participation counted if a prime contractor is an MBE or WBE and awards subcontracts to other MBEs, WBEs or non MBEs/WBEs? When reporting its accomplishments, EPA is attempting to measure the amount of overall MBE/WBE participation in the program. We are measuring the number of MBE/WBE firms participating in the program. We only count the total number of dollars awarded to every MBE or WBE firm. Our assumption is that all MBE/WBE firms awarded contract dollars under EPA's grant programs benefit to that extent from the fair share policy. Therefore, the counting of MBE/WBE dollar amounts under a particular prime contract will result in a total that is no more than 100 percent of the value of the contract. For example, if an MBE firm is awarded a prime contract and then subcontracts 30 percent to another MBE firm, the total number of dollars awarded would remain at the 100% level. This would also remain true, if the prime contractor awarded a subcontract to a non MBE/WBE. The percentage of award being placed with a non MBE/WBE has no bearing on the total amount being reported unless such percentage exceeds the 49 percent level. If a minority or women-owned prime contractor awards more than 49 percent to a non MBE/WBE, no dollars will be reported for either.

3. **Questions on calculating MBE/WBE participation.** Should a recipient or contractor have any questions on calculating MBE/WBE participation, they should contact their appropriate State agency, or the EPA Regional SDBU Coordinator.

4. **MBE/WBE brokers.** Recipients may not count expenditures to MBEs or WBEs that act as a broker in a transaction. A broker is a firm that does not, itself, perform, manage or supervise the work of its contract or subcontract in a manner consistent with the normal business practices for contractors or subcontractors in its line of business. An MBE or WBE will also be considered a broker if it subcontracts more than 49 percent of the work. The MBE or WBE

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contractor may correct this presumption by demonstrating that the greater percentage of subcontracting that it is doing is consistent with normal practices for contractors or subcontractors in its line of business and that it will actively perform, manage and supervise the work of its contract.

5. **Central Purchasing/Procurement Centers.** Recipients must verify procurement dollars for MBE/WBE firms received from central purchasing/procurement centers and develop a tracking system for these Federal dollars.

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BID PROTESTS

CHAPTER 9

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CHAPTER 9

BID PROTEST

1. Challenges to MBE/WBE Status.

Complaints by firms challenging another firm's status as an MBE/WBE will not be entertained under EPA's bid protest procedures. Any firm or individual that files a false statement may be prosecuted under 18 U.S.C. 1001. Because of the interest of bona fide MBEs/WBEs in obtaining contracts/procurements, it is reasonable to conclude that such bona fide firms will help EPA and appropriate Federal authorities identify "bogus" or "front" MBEs/WBEs. In the event that allegations are made that a firm misrepresented its status as an MBE/WBE, the matter may be investigated by the Office of the Inspector General and, where appropriate, turned over to the Department of Justice for criminal and/or civil prosecution.

Such firms can also be excluded from further participation in Federal programs by debarment or suspension action. Actions for exclusion from all Federal Acquisition activities are taken under the Federal Acquisition Regulations, 48 CFR Subpart 9.4; actions for exclusion from EPA assistance programs are taken under 40 CFR Part 32.

2. MBE/WBE Compliance -- Bidder Responsibility vs Bid Responsiveness.

a. **General Rule on Responsibility vs Responsiveness.** As a general rule, MBE/WBE documentation (i.e., documentation demonstrating compliance with grantee MBE/WBE requirements) is a matter of bidder "responsibility".

(1) **Responsibility.** The term responsibility means the apparent ability of the bidder to successfully carry out the requirements of a contract. Aspects of responsibility include such things as financial resources, technical qualifications, experience, organization and facilities adequate to carry out the project, ability to meet the completion schedule, satisfactory contract performance record and compliance with or willingness to comply with civil rights laws and other legal requirements. See 40 CFR § 31.36(b) (8), (d) (2) (ii) (D), and (d) (3) (iv) [which are applicable to local and Indian tribal governments] and 40 CFR §30.44(d). The determination of bidder responsibility focuses upon the bidder's apparent ability to perform in the required

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manner on the date performance is required. Where a bidder has failed to submit information required to demonstrate its responsibility, such information may be submitted after bid opening, but prior to contract award. Consequently, a bidder who is not responsible when bids are submitted may still qualify for contract award if it can establish its responsibility before the contract award date.

MBE/WBE compliance documentation serves the principal purpose of assisting the recipient in determining whether the bidder is responsible, i.e., has the ability to meet, or make good faith efforts to meet, the recipient's MBE/WBE goals and satisfy the EPA fair share policy. Therefore, if a bidder fails to complete all the MBE/WBE forms with its bid or fails to make good faith efforts prior to submitting the bid, these shortcomings may be corrected after bid opening. The exception to this rule occurs when the recipient has specifically made MBE/WBE requirements and demonstration of positive efforts matters of bid "responsiveness" to be determined at the time of bid opening.

(2) **Responsiveness.** A "responsive" bid is one which on its face meets the specifications and the material terms of the Invitation for Bid (IFB). Material terms are those terms affecting price, quantity, quality or delivery and any other terms which are clearly identified by the bid solicitation documents as requirements that must be complied with at the time of bid in order for the bid to be accepted as "responsive".

A failure of a bid to meet a material term of the IFB cannot be cured after bid opening. This is the most significant difference between matters of responsiveness and responsibility.

b. **Careful and Clear Drafting.** Recipients may make compliance with MBE/WBE requirements a matter of responsiveness instead of responsibility. However, because such requirements are normally matters of responsibility, they will have to be treated as such unless the recipient clearly and unequivocally states in the bid solicitation documents that failure to meet the MBE/WBE requirements will cause the bid to be rejected as nonresponsive. In deciding to make these requirements matters of responsiveness, the recipient must exercise extreme care in drafting the IFB and all bid solicitation documents. If there is any ambiguity in these documents concerning whether a bid failing to comply with the requirements will be automatically rejected as nonresponsive, the requirement will be considered to be a matter of responsibility which can be cured by the bidder after bid opening. Consequently, where there

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is such ambiguity in the bid solicitation documents the recipient must not reject a nonconforming bid as nonresponsive.

c. **Protest Examples**. EPA has reviewed numerous recipient procurement actions involving the issue of whether MBE/WBE requirements were made matters of responsiveness or responsibility. The rule which is consistently followed by EPA is that in order for a recipient to reject a bid as nonresponsive due to a failure to do something which is generally a matter of responsibility (such as listing subcontractors and submitting positive efforts information), the solicitation for bids must have clearly and unequivocally stated that such failure would cause the bid to be rejected as nonresponsive. Many of the bid protest appeals considered by EPA involve bid solicitations which were ambiguous as to when the MBE/WBE requirements had to be met by the bidder.

(1) Examples of language which failed to make it sufficiently clear and mandatory that MBE/WBE documentation and requirements must be submitted with the bid include provisions in the bid solicitation stating that:

(a) Failure to submit such information "may be cause to reject the bid," City of Mt. Pleasant, Michigan, (Region V, June 25, 1979) (Protest of Collavinc Const., Inc.);

(b) "Failure to list ... will render the bid nonresponsive and may cause it rejection." Sand Point, Idaho (Region X, March 3, 1983) (Protest of Ludig Const., Inc.); and

(c) "Failure to complete the equipment manufacturers form shall be grounds for rejection of his bid as nonresponsive" New Hampshire Water Supply and Pollution Control Commission (Region I, March 16, 1984) (Protest of Cattamount Const., Inc.).

(2) In each of these examples the language failed to provide for the automatic, mandatory rejection of non-conforming bids. The statement that failure to do something may result in the rejection of the bid is ambiguous. The action verb "may" is equivocal and non-mandatory because of its permissive nature. The fact that it may be rejected implies the possibility that it "may not" be rejected. Where such language is used in the bid solicitation, the recipient cannot reject as nonresponsive a bid which fails to provide documentation of a requirement which is generally considered to be a matter of responsibility. Where an IFB clearly and unequivocally states that failure to submit a subcontractor list or MBE documentation

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will make a bid nonresponsive, but the IFB does not state what action will be taken regarding such a nonresponsive bid (e.g., rejection), it is nevertheless correct to reject the bid, since an award can only be made to responsive bids. See Monterey, California (EPA Region IX, September 12, 1985) (Protest of Mortenson/Natkin).

d. **Reviewing Bidding Documents.** In reviewing bid solicitations to determine whether MBE/WBE matters have been made matters of responsiveness, EPA looks beyond the specific language in the bid form or IFB and examines all areas of the bid solicitation documents to determine whether they are clear and unequivocal. For example, if the language in one portion of the bid documents clearly states that documentation is a matter of responsiveness but the language which appears elsewhere in the document gives a different meaning, the requirement cannot be considered a matter of responsiveness. See, New Hampshire Water Supply and Pollution Control Commission, supra. If the recipient chooses to make certain items, such as commitment to a fair share percentage, a matter of responsiveness, and other items, such as submission of data sheets, a matter of responsibility, the recipient should clearly separate these items and make it clear to bidders which items are matters of responsiveness and which are matters of responsibility.

e. **Consequence of Responsiveness.** If the recipient makes MBE/WBE documentation and requirements matters of responsiveness, it must then reject any bid which fails to satisfy the requirements of the solicitation as of the time of bid opening. The recipient has no real discretion in making this decision because a nonresponsive bid cannot be cured and made responsive after bid opening. Consequently, a bid which is not responsive to the MBE/WBE requirements must be rejected even if the recipient believes that accepting the bid is in its best interests and the best interests of the MBE/WBE program. For example, it would be necessary to reject a bidder that did not submit documentation (if it were a matter of responsiveness) even though after bid opening that bidder demonstrates it satisfies the affirmative steps and attained or promised to attain MBE/WBE participation exceeding the grantee's goals and/or exceeded the MBE/WBE participation offered by the next low bidder. See, Village of Palatine, Illinois (EPA Region V, July 19, 1983) (Protest of Di Paolo-Rossetti). However, in Toronto, Ohio (EPA Region V, February 2, 1984) (Protest of Cavanaugh Co.), a bid that failed to submit documentation required by the IFB was nevertheless responsive because it specifically committed to meeting the grantee's MBE goals. Since the bidder was contractually committed to the goal, the documentation was only relevant to evaluating the bidder's responsibility, that is, its ability to meet the goal.

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f. **Recipient Use of Responsibility Criteria.** Assistance recipients can effectively use definitive responsibility criteria to assure that bidders exercise the required affirmative steps. For example, the Invitation For Bids (IFB) may require that bidders advertise in various newspapers and trade journals, solicit subcontractors by using lists of MBEs/WBEs provided by federal, state or local agencies, and take other specific action to demonstrate that the affirmative steps were taken. The recipient can then determine after bid opening (before contract award) whether the low bidder satisfied the required definitive responsibility criteria and reject any bidder that failed to meet the criteria. See, San Bernardino, Ca. (EPA, Region 9, January 15, 1986) (Protest of MCI Constructors, Inc.).